Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Editor: Diana McCarthy
November 2005

Volume 3
Issues Paper no. 4

Native title-holding groups and native title societies: *Sampi v State of Western Australia* [2005][1]

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Abstract

In 1995 the Bardi Jawi people of the Dampier Peninsula and Buccaneer Archipelago, north-east of Broome in the Kimberley region of Western Australia, lodged their application under the Native Title Act for a determination that native title exists. In this paper, Lisa Strelein examines the Federal Court's decision, handed down on the 10 June 2005 and subsequent reasons published in November 2005. The decision is significant because it is the first substantive determination by Justice French, who is arguably one of the most experienced native title Judges of the Federal Court bench. Exclusive possession was recognised over those areas identified as Bardi, the bulk of the claim area, but the trial Judge rejected the self-definition of the claimant group and consequently did not make a determination over those areas identified as Jawi. Strelein examines the basis for this finding and presents possible alternative formulations that may have been open to the Court.

[1] [2005] FCA 777 (10 June 2005) http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/777.html

[2] The author acknowledges the comments of reviewers and in particular the helpful direction provided by Krysti Guest, Senior Legal Officer, Kimberley Land Council. The views expressed in this article are those of the author and not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

On 10 June 2005 the Bardi and Jawi people of the Dampier Peninsula and Buccaneer Archipelago celebrated a measured success in their application to the Federal Court for recognition and protection of their native title[3]. In 1995 the Bardi Jawi lodged their application under the Native Title Act for a determination that native title exists. The claim was brought on behalf of the Bardi and Jawi people who are descended from 38 apical ancestors and those adopted by those descendants in accordance with Bardi and Jawi traditions and customs.[4] The case was heard over two trials. The first trial in 2001 was not completed due to the illness of the Judge. The second trial in 2003-04 took into account all of the evidence from the first trial and received additional material and evidence.

In the time between the two trials, there had been a number of significant cases, most notably the decision of the High Court in *Yorta Yorta*, as well as a number of federal court determinations that have interpreted and applied the *Yorta Yorta* requirements of proof. The interregnum proved important in providing an opportunity for the native title claimants to address the issue of the 'society' and 'normative system' which the native title group relies upon as the source of rights and interests. Thus the emphasis in the two trials necessarily shifted. This issue proved to be the central point of contention in the final decision. In many respects the determination is a strong one, recognising exclusive possession native title over most of the claim area. However the Judge did not accept the applicants' understanding of what constitutes the society from which the native title is derived.

The decision is also of interest in that it was the first substantive determination by Justice French who was President of the National Native Title Tribunal for 3½ years.[5] French J's analysis of the state of native title law and the requirements in relation to the weight of evidence and the framework for interpretation are worth noting in light of his more academic writing on native title jurisprudence.[6] In terms of setting the framework for consideration of the questions, French J makes two important preliminary points. First, at the outset of his summary of the evidence of the Aboriginal witnesses, the Judge states that their testimony about their traditional Laws and customs and their rights and responsibilities with respect to land and waters is 'of the highest importance. All else is second order evidence' [48]. Second, in the beginning his analysis of the evidence within the statutory framework, Justice French turned first to the preamble of the *Native Title Act 1993* (Cth) and said that 'the preamble stands as a continuing declaration of the moral foundation of the Act and informs its construction. It evidences an intention to recognise, support and protect native title rather than to confine it within nicely parsed verbal bounds' [942].

The society and normative system upon which native title is based

As noted, the assessment of the normative society proved to have a substantive impact on the final outcome in this case. However, the contention relates primarily to the Judge's assessment of the facts and the extent of the determination he was prepared to make. The discussion of the jurisprudence is clearly presented and demonstrates French J's familiarity with the law.

Justice French summarises the rules of recognition established from *Mabo*, through the *Native Title Act* and subsequent decisions, including *Yarmirr* and finally *Yorta Yorta* [952-9]. His Honour notes the need to establish that the traditional Laws and customs that give rise to rights and interests in the land and waters must

[3] Sampi v State of Western Australia [2005] FCA 777 (10 June 2005) (Sampi (No. 1))
[4] The late addition of two Mayala/Jawi ancestors was rejected by the Judge for evidentiary and procedural reasons.
[5] Justice French presided over determinations by consent in relation to Kiwikurra and Martu and Ngurrara which required only brief statements confirming the agreed determinations. See Martu and Ngurrara determination: *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208; and Kiwikurra determination: Brown v State of Western Australia [2001] FCA 1462 (19 October 2001).
[6] Some of French J's reasoning is based on long thought-out jurisprudence, for example in relation to views about extinguishment as metaphor, see paper. French, 'The Role of the High Court in the Recognition of Native Title' UWA Law Review, Vol 2 (30) 2002, pp 129-166.

have normative content: that is, they must derive from a body or system of norms and that this normative system must have existed prior to sovereignty being asserted by the British Crown.[7] However his Honour also states that the continuity required here is not absolute. The rights and interests may undergo significant adaptation and may be bequeathed according to rules of transmission [961, 964].[8]

Justice French notes that the inquiry 'allows for the evolutionary development of traditional Law and custom of the society and, no doubt, of its composition provided that it is able to be regarded as the same "community" of people moving through history and governed by the same traditional Laws and customs' [971]. This understanding reinforces the idea that it is the continuity of the society, not necessarily of each right or interest asserted, which is at the centre of the inquiry. The Bardi and Jawi people argued that they were distinct but closely related groups who formed one society for the purposes of asserting and holding native title. They relied on:

- The universally held belief, on the part of all claimants and witnesses that the Bardi and Jawi are and always have been one people under one system of Law, custom and practice, albeit with distinct territories (including evidence of ceremonial seating arrangements commencing with the different Jawi territorial regions and finishing with the most southern Bardi territorial region);
- Shared language albeit with dialectical differences;
- Shared, regionally specific 'skin' system, shared food prohibitions, shared cultural practices relating to the cutting and distribution of dugong and turtle; and
- Inter-marriage between groups since prior to European presence in the area.

They argued that through these shared characteristics they should be considered as having always been one society at the broadest level.

The Judge accepted that the Bardi and Jawi people today see themselves as essentially one people, united by one Law [1017]. However, he was not convinced on the evidence that the Bardi and Jawi were in fact one society at the time of colonisation. He concluded that 'the probability was that the were two distinct though closely related societies which held their own traditional territories under very similar bodies of traditional Law and custom'[4]. His Honour determined that he could not infer with confidence from the evidence that there was one society at the time of the assertion of sovereignty despite a clear understanding that the shared ceremonial practices were based on a common creation cosmology and despite evidence of the antiquity of the practices. The shared ceremony was not conclusive [1044].

The Judge acknowledged the similarities and shared observances and inter-relatedness and surmised that post colonisation they are now to be considered, as they assert, to be one people, through the process of inter-marriage and the sharing of cultural ceremonies, the dominance of the Bardi and the movement of Bardi into the Islands previously dominated by Jawi.

Justice French concluded that within the claim area, the Bardi society has proved the continuity of its existence although now many Jawi were also considered part of that society. His Honour concluded that Bardi society contained rules of membership that allowed it to become as it is now described the Bardi/Jawi society.

In this way, the current application was treated as essentially a Bardi claim. The Bardi were considered to have incorporated Jawi into their membership through marriage and shared Law but that did not entitle the Bardi to claim the traditional territory of the Jawi (that is, the islands to the immediate north of the mainland)

[7] In Western Australia this was achieved by the tenuous declaration read in the Swan River Colony in 1829 [651].
[8] His Honour notes his understanding of the requirements of proof of continuity stating that: 'the mode of proof of continuity in traditional laws and customs and the society to which they relate involves consideration of the historical, archaeological, linguistic and anthropological evidence in light of the direct evidence of Aboriginal witnesses. Reference may be made to genealogies to support an inference of continuity with the society that existed at the time of colonisations' [964].

without proof of laws of succession under Bardi Law or custom or long practice [1046]. This is in severe contrast to the applicants' view of their history and the basis of their current social and cultural relations.

Implications for native title in Jawi territory

To some extent the consequences for native title over Jawi territory was left open. French J concluded that all the applicants are members of the contemporary Bardi (and Jawi) society. Whether this is fatal to the Jawi continuing to assert their distinct existence, either within the Bardi and Jawi society or as a distinct contemporary society, remained unresolved.

The Judge specifically refrained from making a determination over Jawi territory. However, he made no positive determination as to the existence of a Jawi society at the time of sovereignty and concluded that he was unable to identify a distinct Jawi society in the present. Jawi society has, he presumably concluded, been subsumed into Bardi society. French J refused to make a separate determination in favour of the surviving Jawi people although he left it to the parties to consider whether it was open to him to make a separate determination. His Honour invited a consent determination in relation to the islands [1047]. Needless to say the lack of incentive for the State and Commonwealth governments made a consent determination unlikely. The collateral impact on the adjoining Jawi/Mayala claim group will no doubt be felt in mediation of their application.

In November 2005 French J handed down further reasons to clarify and conclude the matter.[9] In the result, no determination was made over the islands. The Judge recollected that he was unable to make a determination at the time because he was 'unable to discern … any basis upon which a determination could be made in favour of surviving Jawi people who made up part of the native title group'.[10] The applicants provided submissions in favour of a further determination relying on recent determinations in *De Rose* and *Alyawarr* that support the notion that a communal claim is not dependent on the native title claim group who brings the claim being the 'entire society'.[11]

The applicants argued that there was some misunderstanding about the way they had put their case: in particular the emphasis on the unity of the two groups (highlighted at the second trial) should not have been taken to supplant the elements of distinctiveness between the groups. They did not press the Court to reopen findings already made, instead limiting submission to seek the further determination in relation to the Islands.

It should not matter that the claim group identifies or identified as two societies or one (or one whole society and half of another) if the normative systems allow the relevant group to overlap societies in that way so long as the native title group collectively includes all those who possess rights and interests in the claim area under their traditional Laws and customs.

Justice French referred to the way in which the applicants' case was put at trial. The Judge summarised the applicants' submission as: that there was a Bardi/Jawi group said to 'constitute a society whose traditional Laws and customs gave rise to native title rights and interests' [21]. The Judge held that the evidence did not allow the inference that one society of Bardi and Jawi occupied the claim area at sovereignty. He thus restated his initial view that there was only one society, the traditional Bardi society, though it now incorporates Jawi members, and that the traditional territory of that group cannot include the islands [37].

The Judge could have determined native title consistent with the facts although contrary to the precise presentation of the applicants' argument. Indeed

[9] *Sampi v State of Western Australia (No.2)* [2005] FCA 1567 (4 November 2005) (Sampi No. 2); *Sampi v State of Western Australia (No.3)* [2005] FCA 1716 (30 November 2005) (Sampi No. 3).
[10] *Sampi* No. 2, [31], referring to *Sampi (No.1),* [1047].
[11] *Sampi (No.2),* [33-36], relying on *De Rose v State of South Australia (No.2)* FACFC 110*; Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCA 831.

this is what Justice French has done. However the rationale he poses for failing to make a determination over the Jawi territory included in the claim is puzzling. Determinations are made over a determination area. They can and should include all native title interests over the determination area. The Judge did not make a determination that native title does not exist over Jawi territory, despite the best available evidence from the oldest Jawi witnesses about their connection to country and the nature of their separate territory and combined traditions, Laws, customs and practices.

The outcome for the Jawi territory is unsatisfactory and leaves the path forward for the parties somewhat unclear. This is particularly frustrating given the already long and complicated process that the claim group has endured, in which seven of the applicants and many of the witnesses who brought the current application have already passed on before seeing even this compromised result. Arguably, however, alternative formulations were open to the Judge that would have resolved the outstanding claim to the Islands without causing the kind of immense disruption to the Indigenous community that the courts seem unable to avoid.

Alternatives open for a determination in these circumstances

1. A determination that rights and interests in Jawi country form part of the native title rights and interests of the Bardi/Jawi society

If the Judge's conclusions are accepted, the Jawi who are members of the Bardi and Jawi society have rights and interests over common country but may have effectively lost any estate rights or other rights that they held in their own territory. This is inconsistent with the evidence of continuing acceptance by the Bardi of the Jawi assertions of rights over the islands. There was substantial evidence of Jawi connection to country and continued use and access to the Islands and the waters around them, recognised by Bardi and Jawi witnesses.

Moreover, given that it is acknowledged that inter-marriage between the groups predates the assertion of sovereignty by the British Crown, a presumption can be made that this is a long held practice under custom and recognisable as a basis for native title rights. It was reasonable to conclude from the evidence by virtue of both Bardi and Jawi Law (if they are to be considered separate) that, if the Bardi society is said to be dominant, there is clearly a customary acceptance that the Jawi who have become members of the Bardi society retain their distinct identity within the group and their rights to their traditional territories.

The Bardi need not show, as might be inferred from the Judgement, particular laws of succession to external territories. To do so would be to place an impossible standard on the applicants and goes against his Honour's acceptance of the futility of seeking to identify a solid idea of society for all purposes among inter-related and co-located groups with shared, or at least parallel, systems and language.

In defining the rules of recognition French J notes that 'recognition of the rights and interests of a sub-group or an individual, which are dependent on a communal native title, is not prevented by the absence of a communal law that would determine any point in contest between rival claimants' [954]. Clearly this aspect of the reasoning is open to argument on the grounds that the law allows a presumption in favour of the applicants based on customs and practice, as accepted by French J in relation to vacant *Burus* (or estates) in Bardi country.

2. Recognising one native title holding group based on two normative societies

In *WA v Ward*, the Miriuwung and Gajerrong societies were found to hold native title together. Prior to contact, the Miriuwung and Gajerrong were distinct 'organised societies', with separate languages, separate territories and largely separate Laws and customs, although they shared particular dreamings and

cooperated in trade and religious activities.[12] Nevertheless, the Federal Court accepted that the two groups had developed a closer association post contact and in recent times through marriage and population movement, the communities had come to be regarded as a composite community with shared interests and shared Laws and customs for the purposes of establishing rights and interests in land. It was therefore considered appropriate in that case to recognise the Miriuwung and Gajerrong peoples as a single native title group.

In *Sampi*, Justice French distinguished *Ward* arguing that as a determination pre-*Yorta Yorta* the decision did not pay due consideration to the need to establish the normative society [971].[13] In contrast, in *Neowarra*, which was determined post *Yorta Yorta*, Sundberg J referred to the reasoning of the High Court and lower courts in *Ward* in defining the 'recognition level' for the Wanjina-Wungurr native title holding group.

In *Neowarra*, while the claimants identified individually as Ngarinyin, Worrorra and Wunambul, and by their Dambun (clan) relationships, they also articulated the extent of the society with which they share a system of Law and custom, particularly in relation to land, and that is the extent of the Wanjina-Wunggurr community for the purposes of holding native title.

3. Making a determination for multiple native title groups over the same determination area.

Another alternative would have been for Justice French to make a determination that native title in the whole or parts of the determination was held by more than one normative society – This was the case in the Wellesley Island determination. There, the rights of four native title groups were recognised within one determination. Justice Cooper in *Lardil*[14], stated that:

> *At sovereignty, there was no over-reaching [sic] communal system of traditional law acknowledged or customs observed with respect to the land and waters within the claim area by the applicant group as a whole, or by the groups separately, which gave any constituent group rights or interests in the traditional territories of the other constituent group. Any cross-grouping rights were held at an individual level under the specific traditional laws and customs of the constituent group in whose territory the particular land and waters were located. Any agreement made post-sovereignty by the four claimant groups to treat the determination area as a single communal area held by them jointly with four internal areas which they each held separately, is not one recognised by the Act: Yorta Yorta at [43] - [44].*

While I am not sure that this is necessarily a correct interpretation of the Act, it would appear consistent with the reasoning of French J. Nevertheless, Cooper J was able to make a determination for each of the groups. French J himself warns against the use of taxonomies of 'societies' or terms of art from various social or scientific criteria that are not required by the Act and may restrict the beneficial application of the Act [969].

Numerous determinations have accepted that the group may change and coalesce after sovereignty, as we saw in relation to the Wellesley Island, Miriuwung Gajerrong, and Wanjina Wungurr determinations. The need for flexibility in the definition of the native title holding group is also a matter of much wider consideration. Examples such as *De Rose*, and other determinations in which sub-groups have been recognised within the broader Western Desert cultural bloc (which constitutes the normative society from which all of the native title groups

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[12] *Ben Ward & Ors v State of Western Australia & Ors* [1998] FCA1478 (24 November 1998). Confirmed in *State of Western Australia v Ward* [2000] FCA 611 (11 May 2000)

[13] In particular Justice French suggested that Lee J at first instance relied on the 'ancestral connection', which in light of Yorta Yorta would not be sufficient to establish 'the necessary societal continuity' [972].

[14] *Lardil Peoples v State of Queensland* [2004] FCA298 (23 March 2004)

derive their rights and interests) demonstrating that the native title group need not equate with the normative society.

Potential basis for appeal

It may be open to contest the decision of French J on appeal on the basis of the particularity required to establish the continuing rights of members of the Jawi to their territory under the shared customs of the Bardi (or Bardi Jawi) society. In defining the idea of society in relation to native title law, French J notes that the High Court in *Yorta Yorta* does not require a distinction between Law or custom. By custom of long standing, Jawi have obtained rights in Bardi society through inter-marriage and participation in Law and culture while their rights and distinct status has continued to be recognised by Bardi (or Bardi Jawi) society, as is evidenced in aspects of Law such as the ceremonial practices and the assertion of connection. There is evidence that Bardi respect and are bound by the rights and interests held by Jawi over their territory with respect to permission as part of their own Law and perhaps as part of continuing Jawi Law.

The difficulty for the applicants in any appeal may remain the 'dual membership' of many Jawi that has created Bardi/Jawi identity as well as the adjacent Jawi/Mayala identity. The Bardi and Jawi cross recognition and identification is a clear reason for the claim being presented as it was, as a single native title group, but does create some conceptual difficulties in the identification of bounded 'societies'. The practice of the courts in providing significant flexibility in drawing boundaries and groupings appropriate for native title is imperative for the effective recognition and protection of native title.

Communal nature of native title and exclusive possession

Respondents, particularly the Commonwealth, again pressed the argument that native title should be determined at the level of estate groups. This view has been consistently and resoundingly rejected by the court, particularly in Western Australian determinations. This failure to accept the law is a waste of the court's time and is a thinly veiled and deliberate attempt to reduce the claimable land and increase the level of proof required to a parcel by parcel connection (not unlike some connection report requirements under state government policy).

Justice French stated that his rejection of the respondents' contention affirms the 'unitary' character of the Laws and customs that give rise to the native title rights and interests. He states that 'the communal nature of native title 'is not to be lost sight of by an undue concentration on the fractal detail of inter-societal allocations of rights and interests or the modes of their enjoyment' [954]. To do so, he remarks, would be the antithesis of the policy of the legislation and the process of recognition which it seeks to advance. Perhaps more centrally, he concluded, it would be at odds with the evidence which, at least with respect to 'Bardi territory' in his view, demonstrates that the native title rights and interests are held by the whole of the community in relation to the whole of their territory.

The final determination was handed down on country on 30 November 2005. It states that the 'native title rights and interests of the Bardi and Jawi people are the rights of possession and occupation as against the whole world'.

The Judge notes however that s225 of the *Native Title Act* requires an outline of the rights and interests included within this statement. Thus French J suggests that use and enjoyment rights are best defined with more specificity than possession and occupation rights. The use and enjoyment rights are therefore said to include, but presumably are not limited to the following rights:

(a) the right to live on the land;

(b) the right to access, move about on and use the land and waters;

(c) the right to hunt and gather on the land and waters;

(d) the right to engage in spiritual and cultural activities on the land and waters;

(e) the right to access, use and take any of the resources of the land (including ochre) for food, shelter, medicine, fishing and trapping fish, weapons for hunting, cultural, religious, spiritual, ceremonial, artistic and communal purposes;

(f) the right to refuse, regulate and control the use and enjoyment by others of the land and its resources; and

(g) the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

In relation to the offshore waters, the rights were limited to non-exclusive rights of access and use of the areas and resources. Interestingly, the determination does not contain a statement of the right to determine or make decisions as to the use and enjoyment of the land and waters *inter se,* in terms of regulating the living, hunting or resource and use rights of members. Nevertheless, there is much discussion within the Judgement of the laws relating to estates and inheritance, including the accession to estates that become vacant. Instead, the determination contains a reservation that the native title rights and interests are exercisable in accordance with and subject to the:

a) traditional Laws and customs of the native title holders; and

b) the laws and customs of the state and Commonwealth, including the common law.

This underscores the fact that the inclusive list of rights and interests provided in a determination does not exhaustively determine the rights exercisable by the native title group under the protection of the law. It also recognises that native title incorporates an implicit recognition of a parallel system of law.

The right to refuse access, together with the right to regulate and control access, gives significant economic power to the native title holders in this instance. Presumably this enables the native title holders to extract rents. Of course, this is over-ridden by regulation, for example by mining legislation or fishing regulations. If the desire to increase the economic self-sufficientcy of Indigenous peoples within the wider society is to be more than mere rhetoric, it is important that native title rights be exercised and allowed to be exercised for economic gain.

Connection to country and rights and interests in sea country

His Honour reasoned that connection to country is established by continuing internal and external assertion by the group of their relationship to country as defined by traditional Law and custom. That assertion may be physical or otherwise [1079]. In relation to Brue Reef, however, while the evidence established its importance in the mythology or cosmology of the applicants, it did not establish that the law devolved rights in relation to land or waters as a result [1116]. This leaves the claimant group unable to protect an important spiritual site. Arguably the Judge here has placed undue weight on activity based ‘use’ rights of members of the group, thereby discounting the importance of Indigenous forms of connection to land. In this case, avoidance of the area is a form of connection integral to the Law, culture and custom of the group collectively. The form of connection may not equate with European conceptions of property, which are concerned primarily with use and exploitation, but is no less open to protection under native title law. That is, it is an interest in relation to land and waters held by the group collectively.

His Honour did not recognise native title outside of the inter-tidal zone and close by reefs. This is another puzzling aspect of the decision given that evidence was provided by many witnesses of their cultural connection to the sea, their historical use of mangrove log rafts and dug out canoes and their reliance on the sea as a primary source of food, including turtle and dugong. His Honour states that

'the evidence as to use of the open sea beyond the inter-tidal zone was limited to use. It did not establish definable rights under traditional Law and custom in relation to that use. In any event given that the applicants eschew any right to commercial fishing and given that any rights of use of the open sea could only be non exclusive, the claimed right is somewhat tenuous.' [1108].

Arguably French J does not follow his own formulation of the proof of connection through assertion, nor put the use of sea country into the broader context of Law and customs related to the distribution of resources from the sea (in particular the cutting and prioritisation in serving dugong and turtle that is intimately related to kinship and authority systems). Also, his Honour again seems to distinguish between customary rights and traditional Law rights. It is unclear how this will impact on the right to engage in the significant cultural practice of hunting for turtle and dugong outside of the determination area. In all, the decision provides limited protection to the community in relation to their sea country, which, as his Honour acknowledges, is perhaps the most important part of their country given the sustenance it provides.

The applicants also sought the right to protect a significant men's religious site within the sea, which was the subject of gender restricted evidence. Although this right was specifically not claimed as an exclusive right, His Honour observed that:

> *the evidence was directed to the spiritual significance of the area and the necessity to keep people away from it. The right to care for and protect it referred to in the claim, was underpinned by evidence that was entirely directed to a need to exclude people from visiting it … On the evidence of Mr Sampi the non- exclusive right to go to the area and move about on it could only be incidental to a right to exclude or prevent others from crossing the area or visiting it. Given that the common law cannot recognise the true primary right being sought in this case, the ancillary right cannot be recognised* [1112-3].

This conclusion is inconsistent with the determination confirmed by the High Court in *Yarmirr*, which highlighted that within the non-exclusive native title determination area, there may be particular rights over areas of cultural and spiritual significance.

Extinguishment and preservation/prioritisation of native title

While French J identifies 'recognition' as the heart of native title, he acknowledges that the matrix of rules devoted as much to when recognition will be withheld or withdrawn as to when it is accorded [948]. He noted the disjunction between recognition and extinguishment under native title and the rights and interests that arise under traditional Law and customs. Extinguishment he notes in this sense can be a misleading metaphor [949]. This is not a merely jurisprudential debate. French J goes on to draw the conclusion from this that the continuance of rights and interests in particular areas under traditional Law and customs 'may be taken into account in spite of non-recognition' (or extinguishment) under non-indigenous law. It may be relevant to the 'definition of the connection with land and waters', presumably both in relation to proof and the scope of a determination [950].

Sections 47A and 47B: Nature of occupation

The Courts have preferred a broad view of the word 'occupy'. In sections 47A and 47B, it connotes occupancy as appropriate to the kinds of uses that Indigenous peoples would make of the land. Any question of permanence or residency is not required. This extends to the inter-tidal zone, which the Judge suggests is part of their country, as it is used and physical access is made of it. It therefore is occupied in the relevant sense.

Oysters and pearling

Pearl oyster farm licences now expired were held to fall into the definition of leases for aquaculture purposes and are not previous exclusive possessions acts. The Judge preferred a beneficial construction of the legislation rather than one that would maximise the scope of extinguishment [1139].

The applicants are able under s.211 to continue to enjoy the right to use pearl shell for ceremonial purposes and take oysters for subsistence purposes in accordance with traditional Laws and customs. The WA Fishing Industry Council had argued that the *Pearling Act* of 1912 effectively extinguishes all native title rights and interests to take pearl oysters or pearl shell. Presumably this is based on findings in relation to minerals. The Judge considered that the outcome suggested would be 'draconian'. The scheme of legislation is merely regulatory and does not provide for an absolute prohibition. Licences granted to other interests would prevail over native title rights to the extent of any inconsistency.

ISSN 1326 - 0316
ISBN 0 85575 477 X

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